

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC SOUND RESOURCES, a
Washington non-profit corporation; and THE
PORT OF SEATTLE, a Washington
municipal corporation,

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO., a Delaware
corporation; J.H. BAXTER & CO., a
California limited partnership; J.H. BAXTER
& CO., a California corporation; and J.H.
BAXTER & CO., INC., a California
corporation,

Defendants.

Case No. C04-1654L

**DEFENDANT THE BURLINGTON
NORTHERN AND SANTA FE
RAILWAY COMPANY'S MOTION
FOR SUMMARY JUDGMENT THAT
PLAINTIFF THE PORT OF
SEATTLE HAS INCURRED NO
COMPENSABLE DAMAGES**

NOTE ON MOTION CALENDAR:
May 27, 2005

I. RELIEF REQUESTED

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby
moves for summary judgment in its favor on all claims alleged by Plaintiff The Port of Seattle
("Port") on the ground that the Port has incurred no compensable damages. The Port has been, or
will be, reimbursed by the Pacific Sound Resources Environmental Trust ("PSR Trust"), an entity
affiliated with Plaintiff Pacific Sound Resources ("PSR"), for all remedial action costs the Port

THE BNSF RAILWAY CO'S MOTION FOR SUMMARY JUDGMENT THAT THE PORT OF SEATTLE
HAS INCURRED NO COMPENSIBLE DAMAGES

1 allegedly incurred in this action. Therefore, the Port has suffered no damages for which it is
2 entitled to seek recovery from BNSF.

3 **II. INTRODUCTION**

4 Plaintiffs brought this action to recover remedial action costs they allegedly incurred to
5 investigate and remediate contaminated marine sediments in an offshore area of Elliot Bay
6 adjacent to the former location of a wood treating facility commonly referred to as the Wyckoff
7 West Seattle Wood Treating Plant (“the Plant”). Complaint ¶ 3.9 The primary cause of action
8 asserted by Plaintiffs is for contribution under the State of Washington’s Model Toxics Control
9 Act (“MTCA”). RCW 70.105D.080. MTCA is modeled, in part, on the federal Comprehensive,
10 Environmental Response, Compensation, and Liability Act (“CERCLA”). 42 U.S.C. §§ 9601-
11 9675. In addition to their MTCA claim, Plaintiffs seek declaratory relief and have alleged
12 common law claims for negligence, nuisance, and trespass.

13 This case is related to an earlier action filed by Plaintiffs in King County Superior Court
14 in September 2002 to recover remedial action costs they allegedly incurred to investigate and
15 remediate contamination at the Plant. Both cases involve the PSR Superfund Site, which the U.S.
16 Environmental Protection Agency has divided into two operable units: (1) the Upland Unit,
17 consisting of the Plant; and (2) the Marine Sediments Unit, consisting of offshore marine
18 sediments contaminated with hazardous substances associated with the Plant. *See* 40 C.F.R.
19 § 300.5 (defining “operable unit”).

20 In the earlier action, the Superior Court granted the motions for summary judgment made
21 by BNSF and the Baxter defendants¹ that Plaintiffs’ claims are barred by the applicable statutes
22 of limitation. On June 14, 2004, the Superior Court entered final judgments for BNSF and
23 Baxter. Declaration of Thomas D. Adams (“Adams Dec.”) at 7-9.² In its motion, BNSF argued
24 Plaintiffs’ claims were limited to the Upland Unit (*i.e.*, the Plant) and were barred because
25

26 ¹ The term “Baxter” refers collectively to: J.H. Baxter & Co., a California limited partnership;
27 J.H. Baxter & Co., a California corporation; and J.H. Baxter & Co., Inc., a California corporation

28 ² All documents cited herein, except for Plaintiffs’ Complaint, are attached to the Declarations of
Thomas D. Adams or Marc A. Zeppetello.

1 cleanup standards had been met in the Upland by no later than November 1998. Plaintiffs argued
 2 their claims included costs incurred in both the Upland and Marine Sediments Units. At the time
 3 it entered judgment for BNSF and Baxter, the Superior Court clarified that it had determined
 4 Plaintiffs had not presented claims for costs incurred in the Marine Sediments Unit, but that
 5 Plaintiffs were free to assert such claims in a separate action. *Id.* at 10-11.

6 On June 30, 2004, Plaintiffs appealed the judgments entered in the earlier action to the
 7 Washington Court of Appeals.³ On the same day, Plaintiffs filed this case in King County
 8 Superior Court to recover remedial action costs they allegedly incurred at the Marine Sediments
 9 Unit only. Complaint ¶ 3.9. BNSF and Baxter jointly removed this case to this Court.

10 Because the Port has incurred no costs in the marine sediments that have not been fully
 11 reimbursed by the PSR Trust, the Port has suffered no damages whatsoever. Such costs or
 12 damages are an essential element of each of the Port's causes of action. Accordingly, summary
 13 judgment should be entered against the Port and in favor of BNSF on all causes of action.

14 **III. STATEMENT OF UNDISPUTED FACTS**

15 Due to the lengthy and complicated factual background that provides the necessary
 16 context for this motion, BNSF is compelled to submit a large number of documents with the
 17 accompanying declarations of counsel. However, once that context is understood, the issues are
 18 straightforward and the material undisputed facts are documented in relatively few exhibits.

19 **A. History of Wood Treating Operations**

20 The Plant consists of approximately 25 acres, including 22.7 acres of property formerly
 21 owned by PSR (and now owned by the Port) and 2.3 acres of State-owned harbor area formerly
 22 leased by PSR from the Department of Natural Resources. Adams Dec. at 13-14 (¶¶ 5-7), 15, 18.

23 Various companies conducted wood treating operations at the Plant from about 1912 to
 24 1994. Complaint at ¶¶ 2.1, 2.4-2.6, 3.1, 3.7, 3.8; Adams Dec. at 25, 32. PSR and its corporate
 25 predecessor, the Wyckoff Company ("Wyckoff"), solely owned and were responsible for
 26

27 ³ Washington Court of Appeals, Division 1, Case No. 54491-8-1. The parties have completed
 28 briefing on the appeal, and the Court of Appeals has scheduled oral argument for June 6, 2005.

1 operations at the Plant from December 1965 until 1994, when PSR ceased operations and sold its
 2 property at the Plant to the Port. Adams Dec. at 18, 41 (¶4.1), 44 (¶6.2), 46 (¶11.1); 55 (¶7);
 3 Complaint at ¶ 2.1.

4 As a result of its operations, the Plant became contaminated with creosote,
 5 pentachlorophenol, chemonite, and other substances associated with wood-treating operations.
 6 Adams Dec. at 19, 56 (¶9); Complaint at ¶ 2.1. A significant source of contamination was the
 7 “transfer table,” used for loading and unloading retorts, which was located in a shallow unlined
 8 earthen pit known as the “transfer table pit.” Adams Dec. at 56 (¶9).

9 In 1980, Wyckoff submitted to the United States Environmental Protection Agency
 10 (“EPA”), pursuant to the federal Resource Conservation and Recovery Act (“RCRA”), a notice
 11 of hazardous waste activity and a hazardous waste permit application indicating that Wyckoff
 12 generated and stored various hazardous wastes at the Plant. *Id.* at 66-71. *See* 42 U.S.C. §
 13 6930(a); 40 C.F.R. § 270.70(a)(1). The notice and permit application brought the Plant into
 14 RCRA’s newly established “cradle to grave” program for regulating hazardous wastes.

15 **B. History of Enforcement Actions Against Wyckoff**

16 In August 1984, EPA issued an administrative order to Wyckoff pursuant to RCRA and
 17 the Clean Water Act (“CWA”). Adams Dec. at 72-76. The order found, among other matters,
 18 that Wyckoff: (1) engaged in the unauthorized treatment of wastewaters containing wood
 19 treatment chemicals, which were stored in the transfer table pit and formed contaminated sludges;
 20 and (2) discharged pollutants to the Duwamish River without a permit by pumping accumulated
 21 mixtures of wastewater and contaminants out of the transfer table pit via a fire hose into a Metro
 22 storm sewer. *Id.* at 74-76.

23 Following issuance of the administrative order, the government concluded that Wyckoff’s
 24 conduct was criminal. In plea agreements filed in this Court on March 11, 1985, the corporation,
 25 its President, and three employees pled guilty to criminal violations of federal environmental
 26 laws. *United States v. The Wyckoff Company, Inc., et al.*, W.D. Wash. Case. No. CR84-167V.
 27 Adams Dec. at 77-82. The corporation pled guilty to knowingly and willfully storing hazardous
 28 waste in the transfer table pit without a RCRA permit and to willfully and negligently

1 discharging pollutants into the Duwamish River without a CWA permit. *Id.* at 77-78, 84-85.
2 Wyckoff's President pled guilty to violating RCRA and its implementing regulations, and the
3 employees pled guilty to conspiracy to violate the CWA. *Id.* at 80, 82.

4 In September 1987, Wyckoff and EPA entered into an administrative consent order
5 pursuant to RCRA and CERCLA. *Id.* at 99-100. The order required Wyckoff to: (1) complete
6 an investigation to determine the nature and extent of the hazards associated with the release of
7 hazardous substances at or from the Plant; (2) perform a study to evaluate alternatives for
8 appropriate corrective action deemed necessary by EPA; (3) perform an interim corrective action;
9 and (4) submit a closure plan for the transfer table. *Id.* at 100.

10 EPA found that Wyckoff's implementation of its administrative orders was slow and
11 intermittent. *Id.* at 19, 102. Nevertheless, in January 1990, EPA issued yet another
12 administrative order to Wyckoff, this one pursuant to RCRA and CERCLA. *Id.* at 83. This order
13 required Wyckoff to: (1) post notice and construct a fence to eliminate unrestricted access to the
14 Plant; (2) prepare and implement a number of interim measures work plans; and (3) prepare and
15 implement a remedial investigation and feasibility study ("RI/FS") work plan.⁴ *Id.* at 86-98.

16 In March 1990, Wyckoff notified EPA that it did not have sufficient resources to comply
17 with the administrative order and that, if ordered to comply, Wyckoff would file for bankruptcy.
18 *Id.* at 103-04. Wyckoff claimed the effect of the order was to require closure and dismantling of
19 the wood treating plant, which would eliminate the cash flow needed to fund remedial actions at
20 the Plant. *Id.* at 105. Wyckoff also informed EPA that the Port had expressed interest in
21 purchasing Wyckoff's property at the Plant if it could do so without assuming any liability for the
22 contamination. *Id.* at 106.

23 Wyckoff made a four-part proposal to EPA: (1) all Wyckoff assets would be devoted
24 exclusively to costs of business operations and environmental projects; (2) Wyckoff would
25

26 ⁴ The purpose of an RI/FS is "is to assess site conditions and evaluate alternatives to the extent
27 necessary to select a remedy." 40 C.F.R. § 300.430(a)(2). *See also* WAC § 170-340-200 (RI/FS
28 means a remedial action that consists of activities to collect, develop, and evaluate sufficient
information regarding a site to select a cleanup action).

1 negotiate for sale of its property at the Plant to the Port and continue required remedial actions,
 2 taking into account the Port's development plans for the Plant; (3) Wyckoff and EPA would
 3 coordinate and prioritize necessary remedial actions at the Plant and at the Wyckoff/Eagle Harbor
 4 Superfund Site, a contaminated facility on Bainbridge Island where Wyckoff also had conducted
 5 wood treating operations;⁵ and (4) Wyckoff directors and management employees would be
 6 insulated from personal liability. *Id.* at 108-12.

7 Although EPA did not accept Wyckoff's proposal, EPA, Wyckoff (which changed its
 8 name to PSR in 1992 and later became the lead plaintiff in this case), and the Port began a series
 9 of negotiations that in 1994 resulted in agreements for closure of the Plant and the Port's
 10 acquisition and cleanup of PSR's property.

11 **C. The Port's Acquisition of the PSR Property**

12 The Port was interested in PSR's property at the Plant in connection with its planned
 13 Southwest Harbor Cleanup and Redevelopment Project ("the SW Harbor Project"). Pursuant to
 14 the SW Harbor Project, the Port planned to enlarge and modernize its Terminal Five container
 15 shipping facility to ensure continued use by the Port's largest maritime customer, American
 16 President Lines. The Port expected the SW Harbor Project to generate large-scale economic
 17 benefits for the Pacific Northwest regional economy along with needed environmental restoration
 18 of contaminated lands in the Seattle Harbor. *Id.* at 19-20, 43-44 (¶¶6.1-6.2), 113-14.

19 The Port considered the Plant site to be a "key portion" of the SW Harbor Project. Yet
 20 the Port was reluctant to acquire the PSR property because this would result in substantial
 21 environmental liability for the Port as the property owner. *Id.* at 20, 114. Consequently, the Port
 22 negotiated a detailed scope of work with EPA to identify the specific remedial actions the Port
 23 would implement at the Plant in return for a covenant of no further liability from EPA. *Id.* at
 24 20-22.

25 While negotiations with PSR and the Port continued, in May 1993 EPA proposed, with

27 ⁵ Eagle Harbor was operated in much the same manner as the Plant from the early 1900's to
 28 approximately 1988. *Id.* at 53-55 (¶¶4-5, 8). Any liabilities associated with Eagle Harbor are not
 a part of this action.

1 the full support of the Port, to add the Plant to the National Priorities List (“NPL”) – the so-called
 2 “Superfund Sites” – of high-priority sites targeted for response actions under CERCLA. *Id.* at 55
 3 (§6), 116-17. Consistent with CERCLA and implementing regulations known as the National
 4 Contingency Plan (“NCP”), 40 C.F.R. Part 300, EPA began planning to investigate the nature
 5 and extent of contamination at the Plant, study feasible remedial alternatives, and select response
 6 actions. Adams Dec. at 42 (§4.6).

7 On November 24, 1993, Wyckoff’s successor, PSR, and the Port entered into an
 8 Agreement for Option to Purchase and for Purchase and Sale of Real Estate (“Purchase
 9 Agreement”) concerning the PSR property at the Plant. *Id.* at 118-21. The Purchase Agreement
 10 recites, among other provisions, that: (1) PSR is in the process of negotiating a Consent Decree
 11 with EPA and natural resource damage trustees; (2) the Port and EPA are negotiating certain
 12 agreements relating to the acquisition of the PSR property, subject to a plan to remediate
 13 environmental damage on the property; and (3) the Port desires to obtain an option to purchase
 14 the property. *Id.* at 118.

15 The Purchase Agreement states that the Option Fee is \$1.4 million. *Id.* at 119. The Port
 16 paid the Option Fee, and PSR disbursed the funds exclusively to its creditors, as required by the
 17 Purchase Agreement, to allay fears that those creditors might file involuntary bankruptcy
 18 proceedings against PSR. *Id.* at 21-22, 119, 123. The Purchase Agreement provides that, in the
 19 event the Port elects to exercise the Option, and upon closing of the purchase of the property, the
 20 total amount of the Option Fee paid by the Port to PSR “shall be applied and credited against the
 21 purchase price for the Property.” *Id.* at 120. The Purchase Agreement states that the purchase
 22 price for the property “shall be \$9,000,000.”⁶ *Id.* at 121.

23
 24 ⁶ The Port had commissioned an appraisal that concluded the PSR property would have a fair
 25 market value of \$8.2 million if there were no contamination. *Id.* at 20. The Port initiated
 26 negotiations with representatives of the PSR, EPA, and the United States Department of Justice
 27 by offering to pay \$9.2 million (the appraised value of the property plus a \$1million premium for
 28 a covenant not to sue from EPA). *Id.* at 20-21. The terms and conditions under which the Port
 would purchase the PSR property evolved during subsequent negotiations. *Id.* at 21-22. The
 agreed upon terms and conditions are set forth in the Agreement and Covenant Not to Sue Re
 PSR Superfund Site, discussed below.

1 In April 1994, EPA held a public RI/FS scoping meeting for what it at that time referred
 2 to as “the PSR site.” *Id.* at 126. On May 5, 1994, EPA informed the scoping meeting
 3 participants and other interested parties that EPA had determined to separate the PSR site into
 4 two “operable units” – (1) the Upland Unit, which is co-extensive with the Plant; and (2) the
 5 Offshore or Marine Sediments Unit.⁷ *Id.*

6 On May 31, 1994 EPA formally listed the “PSR Superfund Site” on the NPL. 59 Fed.
 7 Reg. 27,989 (May 31, 1994); *See* 40 C.F.R. Part 300 Appendix B. Adams Dec. at 42 (¶4.5).
 8 The NPL listing enabled EPA to obtain additional funding from the CERCLA Hazardous
 9 Substance Superfund for implementing and directing remedial actions at the Site. *See* 42 U.S.C §
 10 9604(c)(1) (findings required for EPA to exceed \$2 million limit on response actions).

11 In August 1994, this Court entered the Consent Decree that PSR and EPA had negotiated
 12 to resolve PSR’s environmental liabilities associated with the Plant and the Wyckoff/Eagle
 13 Harbor Superfund Site (collectively “the Sites”). Adams Dec. at 50-65. The Decree was entered
 14 in the case the United States, the Suquamish Tribe, and the Muckleshoot Indian Tribe had filed
 15 approximately four months earlier, in May 1994, against PSR (formerly Wyckoff) and related
 16 parties. *United States, et al. v. Pacific Sound Resources, Inc., et al.*, W.D. Wash. Case C94-687.
 17 The complaint asserted claims under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and
 18 9607, and sought natural resources damages, injunctive relief for response actions arising out of
 19 the release and/or disposal of hazardous substances at or from the Sites, recovery of all response
 20 costs incurred by the United States, and a declaration of the defendants’ liability for future costs.

21
 22 _____
⁷ EPA defines the term “Operable unit” to mean:

23 a discrete action that comprises an incremental step toward comprehensively addressing
 24 site problems. This discrete portion of a remedial response manages migration, or
 25 eliminates or mitigates a release, threat of release, or pathway of exposure. *The cleanup*
 26 *of a site can be divided into a number of operable units, depending on the complexity of*
 27 *the problems associated with the site.* Operable units may address geographical portions
 of a site, specific site problems, or initial phases of an action, or may consist of any set of
 actions performed over time or any actions that are concurrent but located in different
 parts of a site.

28 40 C.F.R. § 300.5 (emphasis added).

1 Adams Dec. at 50-51.

2 Under the Decree, PSR committed to cease all wood treating operations at the Plant and
 3 the heirs of Wyckoff founders and certain PSR management personnel agreed to convey their
 4 inheritance and equity interests in PSR to the PSR Trust, which had been created during
 5 negotiation of the Decree. *Id.* at 52, 57-58. The Decree required all PSR assets and resources to
 6 be liquidated and the proceeds disbursed by the PSR Trust pursuant to the attached Liquidation
 7 Plan. *Id.* at 58-59 (¶16), 64.⁸ In return for the commitments of PSR and the individual
 8 defendants, the plaintiffs covenanted not to file a civil action or take administrative action against
 9 the defendants under CERCLA or RCRA, subject to certain exceptions, for matters arising out of
 10 the releases of hazardous substances at the Sites, provided the defendants performed their
 11 respective obligations under the Decree. *Id.* at 60-61.

12 While it negotiated the Decree with PSR, EPA also negotiated two agreements with the
 13 Port: (1) Agreement and Covenant Not to Sue Re PSR Superfund Site (“Prospective Purchaser
 14 Agreement”); and (2) Administrative Order on Consent Re PSR Superfund Site (“AOC”). *Id.* at
 15 37-49, 128-36. In summary, the Prospective Purchaser Agreement resolved the Port’s potential
 16 liability to EPA for the PSR Superfund Site, in anticipation of its purchase of the PSR property,
 17 and the AOC specified the response actions to be implemented by the Port at the Plant, under
 18 EPA’s supervision.

19 Under the Prospective Purchaser Agreement, which was executed in August 1994, the
 20 Port agreed to provide two components of consideration. *Id.* at 43 (¶5.3), 46 (¶11.1). The Port
 21 agreed to pay in cash into the PSR Trust \$9 million, “including payments made into options and
 22 escrow by the Port prior to the closing of the purchase and sale agreement for the PSR property.”
 23 *Id.* at 46 (¶11.1). The Port further agreed to provide “in-kind consideration” in the form of
 24 environmental response actions [at the PSR Superfund Site] valued at \$7.2 million, in accordance

25 _____
 26 ⁸ The Decree provides that the liquidation proceeds, “which are exclusively for the benefit of the
 27 Plaintiffs shall be paid as follows: One half into the United States Hazardous Substance
 28 Superfund Trust...and the other one-half into the registry of this court, as set forth in the
 Liquidation Plan, and in accordance with the Memorandum of Agreement (‘MOA’) among the
 Plaintiffs, Attachment ‘A’ hereto.” *Id.* at 58-59 (¶16).

1 with one or more Port AOC's. *Id.* at 43 (¶5.3), 46 (¶11.1). In return, EPA agreed not to sue or
 2 take other enforcement action against the Port for injunctive relief or reimbursement of response
 3 costs with respect to the existing environmental contamination at the PSR Superfund Site. *Id.* at
 4 48 (¶12.1). Similarly, the Port agreed not to assert any claims against the United States or against
 5 PSR or its principals, or against the PSR Trust (except pursuant to the Prospective Purchaser
 6 Agreement), for any costs arising out of response activities at the PSR Superfund Site. *Id.* at 48-
 7 49 (¶12.2). By entering into the Prospective Purchaser Agreement, *the Port expressly assumed*
 8 *no liability for any aquatic lands, including marine sediments, managed by the Department of*
 9 *Natural Resources.* *Id.* at 45 (¶6.4).

10 The Prospective Purchaser Agreement recognizes that the Port would be undertaking
 11 activities at the Plant that combined elements of environmental response action and property
 12 improvement or redevelopment in connection with the SW Harbor Project. EPA and the Port
 13 agreed that seventy-five percent of these activities would be deemed environmental response
 14 activities, and twenty-five percent would be deemed construction and/or redevelopment. EPA
 15 and the Port further agreed that credit to the Port for in-kind consideration, and reimbursement
 16 from the PSR Trust from money paid to the PSR Trust by the Port, would accrue "at the rate of
 17 seventy-five cents for every dollar spent by the Port to implement EPA-approved work plans
 18 developed pursuant to a Port AOC." *Id.* at 46 (¶11.2).

19 After the Port received full credit for the \$7.2 million of in-kind consideration, the
 20 Prospective Purchaser Agreement provides that the Port will be reimbursed from the PSR Trust
 21 on a monthly basis, following the Port's submission, and EPA's acceptance, of appropriate
 22 invoices and documentation "of the activities performed and costs incurred by the Port during the
 23 preceding month in implementing this or other Port AOCs." *Id.* at 47 (¶11.3). The Port agreed
 24 not to seek any reimbursement of costs from the PSR Trust in excess of the \$9 million paid by
 25 the Port for the PSR Property.⁹ *Id.* at 47 (¶11.3), 122-23.

26
 27 ⁹ The Port reserved the right to present claims to the Hazardous Substance Superfund for
 28 reimbursement of response costs which were not reimbursed by the PSR Trust and were not costs
 credited to the Port's \$7.2 million of in-kind consideration. *Id.* at 47 (¶11.3), 123.

On or about October 13, 1994, after entry of the PSR Consent Decree and execution of the Prospective Purchaser Agreement, PSR conveyed its property at the Plant to the Port. *Id.* at 24, 137-39. PSR subsequently transferred to the PSR Trust the net proceeds paid by the Port for the purchase of the PSR property, which amounted to approximately \$7.3 million (not including the Port's two previous option payments totaling \$1,650,000).¹⁰ Declaration of Marc A. Zeppetello ("Zeppetello Dec.") at 10, 12-13.

D. The Port's Cleanup and Redevelopment of the Plant

The purpose of the AOC, which was issued in September 1994, was "to provide for EPA oversight and control of all environmental response activity to be performed by the Port at the Site." Adams Dec. at 129. The AOC identified a number of deliverables the Port had previously submitted to EPA, and, together with an attached Statement of Work enumerated six additional tasks to be performed by the Port at the Plant: (1) Project Management; (2) Assess Current Conditions and Supplement Site Security/Control; (3) Site Stabilization and Plant Demolition (Time Critical Removal Actions);¹¹ (4) Early Actions (Non-Time Critical Removal Actions); (5) RI/FS Study Sampling; and (6) Surface Capping. *Id.* 130-31. The latter four tasks are discussed below.¹²

The objective of Task 3, Site Stabilization and Plant Demolition, was to complete time-critical actions necessary to reduce or minimize threats to public health or the environment. *Id.* at 133. To meet this objective, in 1995, the Port demolished the entire wood treating plant and excavated and removed approximately 4,000 cubic yards of contaminated soil and sludge. *Id.* at 26-27, 140.

¹⁰ The initial Option Fee was \$1.4 million, and in April 1994, the Port authorized its Executive Director to extend the option period and to fund an additional option payment of up to \$250,000. Adams Dec. at 119, 124. *See also* Zeppetello Dec. at 15 (option payments of \$1,650,000).

¹¹ Time-critical actions generally are those initiated within a six-month period, while non-time-critical actions are those expected to have a planning period of at least six months before onsite activities begin. *See* 40 C.F.R. § 300.415(b)(4).

¹² The first two tasks are not addressed because they involve management and assessment rather than actual cleanup activities.

1 The objective of Task 4, Early Non-Time Critical Removal Actions, was to implement
 2 removal actions necessary to reduce or minimize the Plant's impact as a source of contaminants
 3 to the surrounding area. *Id.* at 134. To meet this objective, in 1996, the Port installed a
 4 subsurface physical containment barrier (a slurry wall) across the northern portion of the Plant to
 5 prevent contaminants that float at or on top of the groundwater surface, referred to as light non-
 6 aqueous phase liquids ("LNAPL"), from entering Elliot Bay and to dampen tidal effects in the
 7 shallow groundwater at the Plant. The slurry wall is approximately 1,600 feet in length and
 8 varies in depth from about 32 to 51 feet below the ground surface. *Id.* at 28. The Port also
 9 installed an LNAPL recovery trench on the upland side of the slurry wall to intercept and recover
 10 LNAPL before it could reach Elliott Bay. The LNAPL recovery trench is 1000 feet long, 15 feet
 11 deep, and includes 10 recovery sumps. *Id.*

12 The objective of Task 5, RI/FS Sampling, was to ensure the collection of all soil,
 13 groundwater, and surface water samples necessary for EPA to make remedial action decisions for
 14 the Plant. *Id.* at 135. To meet this objective, the Port, among other tasks, conducted three rounds
 15 of groundwater sampling between April 1995 and September 1996. *Id.* at 33-34.

16 The objective of Task 6, Surface Capping, was to construct a cap for the Plant that met
 17 any requirements for soil and groundwater cleanups, as well as for the protection of human health
 18 and the environment. *Id.* at 136. To meet this objective, the Port constructed a low-permeability
 19 asphalt cap over a layer of clean fill placed at the Plant. The cap prevents any residual
 20 contaminants from coming into contact with people or reaching Elliot Bay through either
 21 migration to groundwater or surface water runoff. *Id.* at 29-30, 142. Construction of the cap was
 22 completed by June 30, 1998. *Id.* at 143-44.

23 In September 1998, shortly after construction of the Plant-wide surface cap, the Port and
 24 American President Lines officially dedicated the completed Global Gateway North container
 25 transfer facility at Terminal 5, which includes the Plant. *Id.* at 145.

26 **E. The Costs Allegedly Incurred By The Port At The Plant And The PSR Trust's**
 27 **Payments to the Port**

28 Beginning in March 1995, the Port submitted periodic "cost accounting reports" to EPA

1 documenting the work conducted and costs incurred by the Port at the Plant pursuant to the AOC.
2 The Port's reports also requested EPA approval of the costs to be credited toward the Port's
3 obligation, under the Prospective Purchaser Agreement, to provide \$7.2 million of in-kind
4 consideration. (Because EPA and the Port agreed in the Prospective Purchaser Agreement that
5 75% of the Port's activities would be deemed environmental response activities and 25% would
6 be deemed construction and/or redevelopment activities, the Port had to incur \$9.6 million in
7 costs to receive full credit for \$7.2 million of in-kind consideration.)

8 Between March 1995 and March 1996, the Port submitted eleven cost accounting reports
9 to EPA in which the Port claimed to have incurred total costs, through February 1996, of
10 approximately \$8.62 million and requested credit for approximately \$6.47 million of in-kind
11 consideration. Zeppetello Dec. at. 16-27. EPA reviewed and approved the Port's reports,
12 including the requested in-kind consideration credit. *Id.* at 28-38.

13 By its twelfth cost accounting report, submitted to EPA in June 1996, the Port claimed to
14 have incurred total costs of approximately \$12.65 million. After subtracting \$9.6 million (to
15 meet the \$7.2 million in-kind consideration obligation), the remainder was about \$3.05 million.
16 The Port requested reimbursement from the PSR Trust for 75% of this remainder, or
17 \$2,285,148.42. *Id.* at 39-40. Upon EPA approval of the Port's request, and at EPA's direction,
18 the PSR Trust paid the Port \$2,285,148.42. *Id.* at 41, 43.

19 The Port's thirteenth, fourteenth, fifteenth, and sixteenth cost accounting reports
20 requested EPA approval of additional costs and reimbursements from the PSR Trust. *Id.* at
21 45-49. EPA approved each of the Port's requests, and the PSR Trust made additional payments
22 to the Port of \$182,041.92 (report 13), \$3,437,198.74 (report 14); \$1,194,288.27 (report 15), and
23 \$72,494.08 (report 16). *Id.* at 43, 50-58. In total, for work performed at the Plant through its
24 sixteenth cost accounting report, the Port claimed to have incurred about \$19.16 million and the
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1 PSR Trust reimbursed the Port over \$7.17million.¹³

2 **F. EPA Determines No Additional Remedial Actions Are Necessary At The Plant And,**
 3 **After A Separate Investigation and Design Process, Begins Implementing The**
 4 **Marine Sediments Remedy**

5 While the Port conducted the tasks specified in the AOC, EPA prepared a RI/FS for the
 6 Plant. EPA distributed the Draft RI/FS to various federal and state agencies for review in June
 7 1997. Adams Dec. at 146. EPA subsequently directed the Port to prepare the Final RI/FS, even
 8 though this task was not part of work required by the AOC. *Id.* at 147. The Final RI/FS, issued
 9 in November 1998, concluded that:

10 ...remedial measures already implemented in the upland are protective of surface water
 11 quality at the [point of compliance] (meets cleanup levels), and that additional remedial
 12 actions in the upland are not necessary. This finding satisfies MTCA requirements for
 13 groundwater cleanup actions (WAC 173-340-720(2) and WAC 173-340-720(6)).

14 *Id.* at 35. The Final RI/FS also found that groundwater at the Plant is protective of human health
 15 and the environment, complies with cleanup standards, and complies with applicable state and
 16 federal laws.¹⁴ *Id.* at 35A.

17 EPA conducted a separate RI/FS process for the Marine Sediments Unit. *Id.* at 151-56.
 18 EPA began this RI/FS in 1996, and issued a draft Remedial Investigation Report and a draft
 19 Feasibility Study in April 1998 and November 1998, respectively. *Id.* at 151, 159-61. The Port
 20 did not prepare the RI or FS reports for this operable unit, and the AOC does not specify any Port
 21 tasks in the marine sediments.

22 On September 30, 1999, EPA issued the Record of Decision ("ROD") presenting its
 23 selected remedies for both operable units.¹⁵ For the Plant (*i.e.*, Upland Unit), EPA reaffirmed its

24 ¹³ The Port's fifteenth report covered the period through October 1998 and completion of the
 25 Plant-wide surface cap. For work performed to that time, the Port claimed to have incurred total
 costs of over \$19.06 million and received reimbursements from the PSR Trust of approximately
 \$7.10 million. *Id.* at 43, 47. The Port's sixteenth report, covering the period from November
 1998 through June 2001, claimed additional costs of only about \$96,658, of which the PSR Trust
 reimbursed the Port \$72,494.08. *Id.*, at 43, 49, 56-58.

26 ¹⁴The Washington Department of Ecology ("Ecology") had determined that the groundwater at
 27 the Plant is not potable and, therefore, the cleanup did not have to meet MTCA groundwater
 standards for drinking water. *Id.* at 31, 36.

28 ¹⁵ EPA is required to document its selected remedy for a Superfund site in a Record of Decision.
 40 C.F.R. § 300.430(f)(1)(ii).

determination in the Final RI/FS that additional engineered remedial measures are not necessary because the completed early actions had eliminated the risk posed by exposure to contaminated soil and the groundwater met applicable cleanup requirements. *Id.* at 149-50, 157.

EPA's remedy for the Marine Sediments Unit consists primarily of: (1) a cap of clean material placed over approximately 50 acres of contaminated sediments; (2) dredging of approximately 3,500 cubic yards of contaminated sediments to maintain navigational access; and (3) removal of unused pilings. *Id.* at 150, 158. Implementation of the remedy began in July 2003, after EPA prepared a remedial design for the marine sediments cap. *Id.* at 162-64. The U.S. Army Corps of Engineers and its contractors are performing the dredging and capping work in the marine sediments, under EPA supervision. *Id.* at 165.

G. The Port Conducted Limited Work In The Marine Sediments Pursuant To A Supplemental Administrative Order Which Provides That It Shall Be Reimbursed For All Costs Incurred

As noted previously, by entering into the Prospective Purchaser Agreement, the Port assumed no liability for the marine sediments. *Id.* at 45 (¶6.4). Nevertheless, in December 2002, the Port and EPA entered into a Supplemental Administrative Order On Consent Re PSR Superfund Site ("Supplemental AOC") pursuant to which the Port subsequently conducted certain remedial actions in the marine sediments, as set forth in an attached supplemental scope of work. *Id.* at 168-71. EPA and the Port apparently entered into the Supplemental AOC because the Port's costs to clean up the Plant had been less than previously anticipated so that, under the Prospective Purchaser Agreement, the Port was entitled to request reimbursement from the PSR Trust for additional costs incurred in the marine sediments.¹⁶ *Id.* at 123.

The Supplemental AOC states that it governs the Port's performance of response activities under the same terms and conditions set forth in the 1994 AOC, except:

¹⁶ In requesting Port Commission authorization to perform work in the marine sediments, its Executive Director explained: "At the time the parties entered the [Prospective Purchaser] Agreement, both the Port and EPA anticipated that the cleanup required for the Port's use of the property would exceed the amount the Port would spend in the purchase and fulfilling the in-kind obligation....In brief, the Agreement did not contemplate the situation that currently exists, i.e., the Port has met its in-kind obligation of \$7.2 million but has not recovered the maximum amount of \$9.0 million from the PSR Trust." *Id.* at 123.

1 Because the parties agree there is no construction component to the supplemental
 2 response activities that are the subject of this AOC, *the reimbursement to the Port for the*
 3 *work shall be at 100 cents for each dollar expended*, rather than the 75 for each dollar as
 4 set forth in the 1994 AOC because 25% of the work required by the 1994 AOC was
 allocated to construction costs associated with the Port's development of the Site
 following the Port's purchase of the Site in conjunction with a Prospective Purchaser's
 Agreement with EPA.

5 *Id.* at 169.

6 During the Summer and Fall of 2003, the Port performed certain work in the Marine
 7 Sediments Unit consisting primarily of removing old pilings from the area where sediments are
 8 being capped by the U.S. Army Corps of Engineers. *Id.* at 167, 170, 173 (¶2), 175.

9 In October 2003, the Port submitted its seventeenth and eighteenth cost accounting
 10 reports to EPA, which together covered work performed by the Port through September 30, 2003,
 11 and requested total reimbursement of \$662,812.72. Zeppetello Dec. 59-65. These two reports
 12 include at least \$490,985 for work performed in the marine sediments pursuant to the
 13 Supplemental AOC, as well as incidental costs for limited work at the Plant. Adams Dec. at 173
 14 (¶3), 175-76. The Port requested reimbursement from the PSR Trust for 75% of the costs
 15 incurred at the Plant and 100% of the costs incurred in the marine sediments. Zeppetello Dec. at
 16 61-62, 64-65.

17 EPA approved the Port's seventeenth and eighteenth cost accounting reports, except for
 18 costs itemized as Port employee salaries, for which EPA withheld authorization pending further
 19 explanation and documentation. *Id.* at 66. EPA authorized reimbursement to the Port in the total
 20 amount of \$583,470.50 under these two cost accounting reports, and in December 2003, the PSR
 21 Trust paid the Port \$583,470.50. *Id.* at 44, 66, 68. EPA and the Port subsequently agreed that
 22 EPA would approve reimbursement of Port employee salaries for all work in the marine
 23 sediments under the Supplemental AOC because the Port performed this work in lieu of a
 24 consultant and for the sole benefit of EPA.¹⁷ *Id.* at 70, 72-74.

25 The Port claims to have incurred additional costs for work in the marine sediments, and
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27 ¹⁷ EPA indicated that it will not authorize reimbursement for the staff charges included in the
 28 Port's seventeenth and eighteenth cost accounting reports for the limited work performed at the
 Plant under the 1994 AOC. *Id.* at 73-74.

intends to submit a report of such costs to EPA for review and approval. Adams Dec. at 173 (¶3), 176. Pursuant to the Supplemental AOC, the Port is entitled to reimbursement from the PSR Trust for 100% of these additional costs.

IV. STATEMENT OF ISSUE

Whether the Port has suffered any compensable damages where the Port has been reimbursed, or is entitled to reimbursement, from the PSR Trust for 100% of the remedial action costs the Port allegedly has incurred for work performed in the Marine Sediments Unit and also is entitled to 100% reimbursement for any reasonably foreseeable future costs.

V. EVIDENCE RELIED UPON

This motion is based on the accompanying Declarations of Thomas D. Adams and Marc A. Zeppetello, including the attached documents, and the pleadings on file herein.

VI. AUTHORITY AND ARGUMENT

A. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Doggett v. Perez*, 348 F.Supp.2d 1198, 1202 (E.D. Wash. 2004). Summary judgment is proper where the documentary evidence produced by the parties permits only one conclusion. *Id.*; Fed.R.Civ.P. 56.

The moving party has the initial burden to prove there is no genuine issue of material fact. Once the moving party has carried its burden under Rule 56, its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). The opposing party must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the non-movant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322-23; *Doggett*, 348 F.Supp.2d at 1202.

B. The Port Has Suffered No Damages In The Marine Sediments And Seeks An Impermissible Double Recovery

“It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.” *Eagle Point Condominium Owners Ass’n. v. Coy*, 102 Wash.App. 697, 702 (2000) (trial court properly offset prior settlement to assure plaintiff did not recover from two parties for the same damages). However, an impermissible double recovery is exactly what the Port would receive here if it is allowed to obtain contribution from BNSF for the costs reimbursed to the Port from the PSR Trust.

The Port seeks contribution in this action only for costs it allegedly incurred in the marine sediments pursuant to the Supplemental AOC. In performing work in the marine sediments, the Port functioned simply as an EPA contractor.¹⁸ EPA reviewed and approved the Port’s costs, and authorized reimbursement to the Port -- *at 100 cents on the dollar* -- from funds the PSR Trust held for EPA’s benefit, and which EPA controlled, in accordance with the PSR Consent Decree. Because the Port, like any other fully-compensated contractor, has not incurred out-of-pocket costs in the marine sediments, it has suffered no compensable damages, and any additional amounts the Port seeks to recover from BNSF would constitute an impermissible double recovery.¹⁹

Through discovery, BNSF asked the Port to admit that it is not entitled to recover in this action any costs it has incurred performing work in the marine sediments that have been reimbursed to the Port pursuant to the Supplemental AOC. The Port denied the request after

¹⁸ The Port’s express disclaimer in the Prospective Purchaser Agreement of any liability for the marine sediments (Adams Dec. at 45 (¶64)) demonstrates that, like an EPA contractor, the Port acted voluntarily and in its own interests in performing work the marine sediments, not because it was legally obligated to do so.

¹⁹ In contrast to the marine sediments, the Port’s alleged damages for work it performed at the Plant would raise numerous issues including, but not limited to: (1) whether the entire \$9.6 million the Port incurred to satisfy its obligation to provide \$7.2 million of in-kind consideration constituted remedial action costs; (2) the appropriateness of the arbitrary 75:25 allocation between remedial costs and development costs set forth in the Prospective Purchaser Agreement; (3) the reasonableness of the consideration the Port paid for the PSR property and the covenant not to sue from EPA; and (4) the extent to which the Port’s alleged damages should be offset due to the increased fair market value of the PSR property resulting from remediation and redevelopment. None of these issues is relevant in this action.

1 objecting to the term “reimbursed” “since it implies that any ‘reimbursement’ was from funds
 2 provided by a third party.” Zeppetello Dec. at 66-67. The Port claimed that reimbursement
 3 under the Supplemental AOC came from the \$9 million the Port had paid to PSR “to hold for the
 4 Port’s use” in cleaning up the PSR property and, therefore, any reimbursement “came from the
 5 Port’s own funds and not from any third party.” *Id.* at 67.

6 There are three fatal problems with the Port’s position: (1) the Port paid the \$9 million as
 7 the purchase price of the PSR property; (2) the \$9 million was disbursed to the PSR Trust for the
 8 exclusive benefit of the trust beneficiaries and did not remain the Port’s money; and (3) even
 9 assuming the reimbursements to the Port for work in the marine sediments were a partial refund
 10 of its \$9 million payment, such reimbursements benefited the Port by effectively discounting the
 11 purchase price of the PSR property so that any contribution obtained by the Port from BNSF
 12 would still constitute an impermissible double recovery.

13 There is no merit to the Port’s argument that the \$9 million it paid in 1994 for the PSR
 14 property remained its own money.²⁰ As required by the PSR Consent Decree, PSR deposited the
 15 funds paid by the Port directly into the PSR Trust, in which the funds were held, together with
 16 other funds from liquidation of PSR’s assets, exclusively for the benefit of the PSR Trust
 17 beneficiaries; those beneficiary include EPA but not the Port. Adams Dec at 58-59 (¶16), 62-63.
 18 Moreover, the PSR Trust used the \$9 million paid by the Port for purposes other than
 19 reimbursing the Port, commingled the Port’s payments with other funds held in the PSR Trust,

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 25 ²⁰ It is undisputed that \$9 million was the purchase price of the PSR property. On its 1994 tax
 26 return, PSR reported \$9 million as the proceeds from the sale of its property at the Plant.
 27 Zeppetello Dec. at 80. *See also* Adams Dec. at 65 (parties to the Consent Decree contemplate
 28 that PSR’s real property at the Plant would be acquired by the Port pursuant to the terms of an
 option agreement between the Port and PSR), 114 (Port will pay the PSR Trust for title to the
 property), 122 (Prospective Purchaser Agreement required the Port to acquire the PSR property
 for a purchase price of \$9 million as delineated in option agreement).

1 and never separately accounted for “the Port’s own funds.”²¹ Zeppetello Dec. at 2 (¶¶2-3). To
 2 the contrary, though the PSR Trust held funds in various accounts over the years, and most were
 3 not designated for a particular purpose, by August 2002, the trustee had established a specific
 4 “EPA subaccount” and, in July 2003, reimbursed the Port from this subaccount. *Id.* at 2 (¶4), 84,
 5 86-89.

6 The Prospective Purchaser Agreement does authorize the Port, once it fulfills its
 7 obligation to provide \$7.2 million of in-kind consideration, to seek reimbursement from the PSR
 8 Trust, upon EPA approval, for additional costs incurred by the Port up to the \$9 million the Port
 9 paid for the PSR property. Adams Dec. at 47 (¶11.3). However, to the extent the Port has been
 10 reimbursed from the PSR Trust’s assets, the Port received the benefit of a substantial discount on
 11 the agreed-upon purchase price for the PSR property.²² In fact, for work it has conducted both at
 12 the Plant and in the marine sediments, the Port has been reimbursed to date approximately \$7.75
 13 million of the \$9 million purchase price, and thus has effectively acquired the PSR property for
 14 only a small fraction of the fair market value it had eleven years ago, before being redeveloped
 15 and improved as an integral part of the Terminal 5 container shipping facility. Given the benefit
 16 conferred on the Port for work performed in the marine sediments, in the form of partial refund of
 17 the purchase price of the PSR property, any contribution obtained by the Port in this action for
 18 the costs of such work would constitute an impermissible double recovery.

19 Regardless of whether the funds disbursed from PSR Trust represent direct payments to
 20 the Port or a partial refund of the PSR property purchase price, the critical point for purposes of
 21

22 ²¹ In late-August 1994, shortly after entry of the PSR Consent Decree, the PSR Trust made two
 23 loans to PSR in the amounts of \$1.4 million and \$250,000, apparently funded by the Port’s two
 24 option payments. Zeppetello Dec. at 82. On October 17, 1994, immediately after the Port’s
 25 acquisition of the PSR property, the PSR Trust made two additional loans to PSR totaling over
 \$618,000, apparently funded by the sale proceeds paid by the Port. *Id.* In January and February
 1995, the PSR Trust made five additional loans to PSR totaling over \$1.7 million. *Id.* See also *id.*
 at 15 (PSR Trust allowed PSR to retain portion of proceeds in exchange for promissory notes).

26 ²² Outside the context of this litigation, the Port has conceded that the Prospective Purchaser
 27 Agreement gives it the right to recover the purchase price of the PSR property by submitting
 28 claims to the PSR Trust, and that this reimbursement right is capped at \$ 9 million, as that is how
 much the Port paid for the property. Adams Dec. at 123.

1 this motion is that, pursuant to the Supplemental AOC and Prospective Purchase Agreement, the
 2 Port is entitled to reimbursement for 100% of the costs it has incurred in the marine sediments.
 3 Moreover, the Port has in fact been reimbursed by the PSR Trust for all such EPA-approved costs
 4 incurred to date and is entitled to 100% reimbursement for any reasonably foreseeable future
 5 costs. Therefore, to avoid an impermissible double recovery, the Port may not seek contribution
 6 from BNSF for the same costs previously reimbursed to the Port by the PSR Trust. *See Brink v.*
 7 *Griffith*, 65 Wash.2d 253, 259 (1964) (although jury awarded separate sums for defamation and
 8 invasion of privacy, plaintiff was not entitled to recover twice for the same elements of damages
 9 growing out of the same occurrence); *Wilson v. Brand S. Corp.*, 27 Wash.App. 743, 747 (1980)
 10 (where proper measure of damages was value of slate, plaintiff not also allowed damages on the
 11 basis of lost profits because he would receive a double recovery, contrary to the principle of
 12 compensatory damages).²³

13 In addition to being precluded under Washington law, CERCLA expressly prohibits the
 14 double recovery sought by the Port. Specifically, CERCLA Section 114(b), 42 U.S.C. § 9614(b),
 15 provides:

16 Any person who receives compensation for removal costs or damages or claims
 17 pursuant to this chapter shall be precluded from recovering compensation for the same
 18 removal costs or damages or claims pursuant to any other State or Federal law. Any
 19 person who receives compensation for removal costs or damages or claims pursuant to
 20 any other Federal or State law shall be precluded from receiving compensation for the
 21 same removal costs or damages or claims as provided in this chapter.

22 Courts have consistently applied this provision to preclude a party from recovering twice for the
 23 same remedial action costs. *See, e.g., Price v. U.S. Navy*, 39 F.3d 1011, 1014 (9th Cir. 1994)
 24 (plaintiff awarded zero net recovery where she previously received payments from State as
 25 reimbursement for cleanup costs and from settlement of her claims against another party); *Boeing*
 26 *Co. v. Cascade Corp.*, 920 F.Supp. 1121, 1140 (D. Oregon 1996) (prohibition against double
 27 recovery requires that settlement funds be factored into allocation of response costs), *aff'd as*
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²³ *See also Town of Superior, Montana v. Asarco, Inc.*, 2004 U.S. Dist. LEXIS 26997 *30-*31
 (D. Mont. 2004) (where the plaintiff has incurred no costs, and no costs are reasonably certain to
 be incurred in the future, plaintiff has not stated a claim for damages).

1 *modified*, 207 F.3d 1177, 1189-90 (9th Cir. 2000).

2 CERCLA Section 114(b) may not directly bar the Port's MTCA claims, and MTCA does
 3 not contain a provision analogous to CERCLA Section 114(b) expressly prohibiting double
 4 recovery. Nevertheless, as under CERCLA, preventing a party from recovering twice for the
 5 same remedial action costs is an appropriate equitable factor for this Court to apply under MTCA
 6 by holding that the Port has suffered no compensable damages in the marine sediments. *See*
 7 *Western Properties Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 691 (9th Cir. 2004) (in CERCLA
 8 contribution action, preventing double recovery for the same harm is one equitable factor);
 9 *Boeing*, 207 F.3d at 1189 (district court correctly noted that one equitable factor is preventing
 10 someone from recovering for the same harm twice); RCW 70.105D.080 (recovery shall be based
 11 on such equitable factors as the court determines are appropriate).

12 C. **As A Matter Of Law BNSF Is Not Potentially Liable To The Port For Any Remedial**
 13 **Action Costs Reimbursed By The PSR Trust**

14 The PSR Consent Decree resolved PSR's liability to the United States under CERCLA.
 15 Adams Dec. at 60-61 (¶33). In requiring that all of PSR's assets, including the PSR property at
 16 the Plant, be liquidated and the proceeds disbursed to the PSR Trust, the Decree established a
 17 source of settlement funds to be used by EPA and the other trust beneficiaries for specified
 18 purposes, including but not limited to, environmental response actions at the PSR Superfund Site.
 19 Under both CERCLA and MTCA, BNSF cannot be liable for remedial action costs reimbursed to
 20 the Port, with EPA approval, from such settlement funds.

21 Specifically, CERCLA Sections 113(f)(2) and 122(g)(5), 42 U.S.C. §§ 9613(f)(2) and
 22 9622(g)(5), each provide that, where a party has entered into a settlement with the United States,
 23 the settlement does not discharge the liability of any other potentially responsible party, "but it
 24 reduces the potential liability of the others by the amount of the settlement."²⁴ Similarly, MTCA
 25 provides that where a party has entered a settlement with the state, the settlement does not

26 _____
 27 ²⁴ CERCLA Section 113(f) governs contribution claims, including those asserted after a person
 28 has resolved its liability to the United States or a State in an administrative or judicially approved
 settlement. CERCLA Section 122(g)(5) governs de minimis settlements.

1 discharge any other liable parties, “but it reduces the total potential liability of the others to the
2 state by the amount of the settlement.” RCW 70.105D.040(4)(d).

3 Under these provisions, even if BNSF may be potentially liable to the Port, which BNSF
4 denies, it cannot be liable to the extent funds from PSR’s settlement with EPA, held in the PSR
5 Trust pursuant to the PSR Consent Decree, were used to reimburse remedial action costs incurred
6 by the Port. *See United States v. Cannons Engineering Corp.*, 899 F.2d 79, 91-92 (1st Cir.
7 1990)(CERCLA § 113(f)(2)’s plain language requires settlement to result in dollar-for-dollar
8 reduction of aggregate liability); *In Re Acushnet River & New Bedford Harbor*, 712 F.Supp.
9 1019, 1026-27 (D. Mass. 1989)(under CERCLA § 113(f)(2) the potential liability of others is
10 reduced “by the amount of the settlement,” not by the settlor’s proportionate share of any
11 damages). *O’Neil v. Picillo*, 682 F.Supp. 706, 729-30 (D.R.I. 1988)(under the express terms of
12 CERCLA § 113(f)(2) the total liability of defendants must be reduced by the amount the state
13 received in settlement from others), *aff’d*, 883 F.2d 176 (1st Cir. 1989), *cert denied*, 493 U.S.
14 1071 (1990).²⁵ Here, the Port has already received 100% reimbursement, from PSR’s settlement
15 with EPA, for the Port’s expenditures in the marine sediments and, therefore, BNSF cannot be
16 liable to the Port for the same costs.

17 In *United States v. Rohm & Haas Co.*, 721 F.Supp. 666 (D.N.J. 1989), a non-settling party
18 objected to a proposed consent decree, which embodied a de minimis settlement, on the grounds
19 that the decree would allow the United States a “double recovery” since it could recover from the
20 non-settlor and the settling parties for the same costs. In rejecting this argument, the court
21 explained:

22 . . . [CERCLA] Section 122(g)(5) leaves no room for a double recovery since the United
23 States will not recover anything from non-settling defendants which it has already
24 recovered from the settlors. *Rather, the most it may recovery from non-settlors is its total
response costs minus any amounts recovered through settlements* (emphasis in original).

25 *Id.* at 700. Thus, CERCLA Sections 113(f)(2) and 122(g)(5), and RCW 70.105D.040(4)(d),
26

27 ²⁵ *See also U.S. v. Burlington Northern R.R. Co.*, 200 F.3d 679, 698-99 (10th Cir. 1999)(where
28 harm is geographically divisible, party is entitled to credit under CERCLA § 113(f)(2) only for
the part of the settlement funds attributable to the property for which it is liable).

operate to preclude the double recovery sought by the Port here. As in *Rohm & Haas*, the most the Port can recover from BNSF is the total remedial action costs incurred by the Port in the marine sediments minus any amounts reimbursed to the Port from the PSR Trust as a result of PSR's settlement with EPA. However, because the Port has been reimbursed for all such costs, and is entitled to 100% reimbursement for any reasonably foreseeable future costs, it has suffered no compensable damages in the marine sediments.

VII. CONCLUSION

For the foregoing reasons, BNSF submits there are no genuine issues of material fact and asks this Court to enter summary judgment in its favor dismissing with prejudice each claim alleged by the Port in Plaintiffs' Complaint.

DATED this 29th day of April, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, April 29, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons listed below:

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